No. 9786

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

MOROLOY BEARING SERVICE OF OAKLAND, LTD. (a corporation),
Appellee.

On Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

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OPINION BELOW.

The memorandum opinion of the District Court (R. 9-11) is unreported.

JURISDICTION.

This is an appeal from a judgment of the District Court entered July 31, 1940 (R. 21-24), in favor of appellee for the refund of $1099.80, with interest, assessed and paid as manufacturer's excise taxes. Notice of appeal was filed October 26, 1940. (R. 24.) The jurisdiction of this Court is invoked under Section 128(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Whether *sales* of automobile connecting rods by appellee were taxable under Section 606(c) of the Revenue Act of 1932, which imposed a tax upon automobile parts "sold by the manufacturer, producer, or importer" thereof.

STATUTE AND REGULATIONS INVOLVED.

These are set forth in the Appendix, *infra,* pp. i-ii.

STATEMENT.

The case was tried to the Court without a jury upon evidence consisting of the testimony of two witnesses offered by appellee, a stipulation as to the dates and amounts of the tax payments and certain exhibits. The Court rendered a memorandum opinion (R. 9-11) and filed findings of fact and conclusions of law (R. 14-21) in favor of appellee.

Inasmuch as we claim the findings are incomplete, contain mixed statements of fact and law and findings clearly not supported by the evidence, we deem it proper here to summarize the undisputed facts shown by the findings as amplified and supplemented by the pleadings and evidence.

Appellee was incorporated under the laws of California (R. 2, 5) and was engaged in the business of selling (R. 9, 11, 58-59, 64) automobile parts to automotive jobbers who in turn sold them to garages and automobile repair men. (R. 34.) Its principal place

of business was in the City of Oakland, California. (R. 2, 6.) So far as here material, it dealt with jobbers and automotive supply houses in the area extending from Fresno to the Oregon line (R. 57), within which area there are jobbers in all important towns. (R. 40.) In the bay district, there are other prominent companies, besides appellee, engaged in similar business, e.g., the Federal Mogul Corporation, which is an eastern company, the Pioneer Bearing Corporation, and several others situated in Los Angeles. (R. 42.)

This case is concerned with appellee's business and operations with respect to its stock of automobile connecting rods which it produced from a combination of new and used materials and sold to jobbers, known also as wholesalers, on the exchange basis of sale for use by garage men and mechanics in the repairing of automobiles. (R. 34-35; Ex. 1.)

The automobile connecting rod is comprised of a steel shank and cap which are held together by bolts and nuts. (R. 37.) Some of the connecting rod factory specifications call for shims. In such cases the rods contain thin brass shims. In many rods there is a bronze bushing or bearing in the smaller end of the shank, such as in the case of a Ford rod. In the larger end, there is a babbitt metal bearing. (See Exhibits 1 to 6.)

In connection with its operations, appellee purchased and used new babbitt metal (consisting of copper, tin and antimony), new tin, new shims, new nuts, new bolts and new bronze bushings. (R. 48-50,

54-55, 62, 63.) The shanks and caps, otherwise known as the forgings, which were used in its processes either were purchased by appellee from people who made it their business to obtain them from automobile wreckers for the purpose of reselling to appellee and others engaged in similar business or were obtained by appellee from its jobbing customers who turned them in on their purchases from appellee of completed rods of similar type on what is known in the trade as the exchange basis of sale for replacement parts. (R. 40-41, 42, 45-46, 70, 71.)

Appellee's connecting rods were known by and sold to the trade under appellee's own stock numbers and trade name "MOR-O-LOY". (R. 50, 61; Ex. 1.) To all intents and purposes the connecting rods sold by appellee were the same as an original rod from the factory which was placed in a new automobile. (R. 64.) Appellee always carried about 4000 connecting rods in stock (R. 64) consisting of possibly 250 different types. (R. 45.) Each year appellee turned out more than 50,000 connecting rods (R. 64), to each of which rods it assigned a stock number of its own for purpose of identification. (R. 61; Ex. 1.) Jobbers ordered from appellee by the latter's stock number shown on the box (R. 61) which conformed to the number in appellee's catalog. (R. 57.) The rods were sold in appellee's own boxes which contained the following printed guarantee: "GUARANTEE. We agree to replace this assembly if defective in material or workmanship." (R. 58; Ex. 1.)

When jobbers ordered a rod which appellee did not have in stock, which occurred during each year, ap-

pellee would buy an entirely new rod from a manufacturer for the purpose of filling the order. (R. 60.)

For each of the months commencing February, 1933, through August, 1936, appellee made and filed manufacturer's excise tax returns under Section 606(c) of the Revenue Act of 1932 with respect to sales to jobbers of its Moroloy connecting rods and paid to the Collector of Internal Revenue a total tax thereon of $1099.80 on divers dates between March 29, 1933, and October 31, 1936. (R. 14-16.) Thereafter, appellee timely filed its claim for the refund of the $1099.80 and, on August 23, 1937, the claim was rejected by the Commissioner of Internal Revenue and appellee was notified thereof. (R. 16-17.)

The following is a summary of appellee's processes and operations in the production of Moroloy connecting rods by combining used forgings of dismantled connecting rods with new materials:

Automobile wreckers (R. 40-41, 45-46) and jobbers are appellee's source of supply for the used forgings. (R. 69.) When received, the forgings are first inspected to see if they are damaged. (R. 46.) If they are damaged they are thrown out. (R. 46.) The cap and shank must always be 100% efficient. (R. 40.) They should not be bent, damaged or dented but, to all intents and purposes, should be in as good condition as the original rod so far as the forging is concerned. (R. 41.) The retained rods are cleaned and, occasionally, one which is slightly bent is straightened. Only about one-tenth of 1% of that character come in. (R. 47.) Usually the wreckers are watching for that. (R. 47.)

The next task is to take out the bolts. Oftentimes the rods come without bolts. (R. 47.) If the threads of the old bolts are in good condition, appellee will use them, otherwise it will not. (R. 48.) If a bolt is damaged or the threads injured at all, new bolts thereafter will be used. (R. 48.)

The cap and the shank are dipped into a pot of molten babbitt of approximately 750 degrees for the purpose of melting out and removing the old babbitt remaining in the rod. (R. 48.) After the forging is heated in the old babbitt, it is treated with a chemical compound so as to cause the tin to adhere thereto. (R. 49.) Then the forging is dipped in molten tin. (R. 49.) The chemical compound acts as a flux and, as stated, assists the tin in adhering to the metal. (R. 49.) Thus, the tin makes a surface upon the metal and serves as a bond between the forging and the new babbitt metal which thereafter is applied by a spinning process or centrifugal motion through the medium of a centrifugal casting machine. (R. 50.) This process results in the building of a new spun bearing within the larger of the two circular openings of the rod. Appellee advertises that Moroloy bearings are processed by the spun bearing process. (R. 50.)

Where factory requirements call for shims, new shims are placed between the cap and shank before they are bolted together with new bolts and nuts, or used bolts and nuts which are in good condition. (R. 51, 53-54.) The shim is a thin piece of brass and is not put in until after the babbitt has been roughly poured and a saw has been applied at the point where

the cap contacts the shank. (R. 51.) After the shims are put in, two bolts are inserted in each forging and a nut is placed on the other end of each bolt and is tightened by turning down. (R. 54.) The bolts and nuts clamp the forging and cap firmly together. (R. 54.) It is then taken to a machine and the rough babbitt bearing is machined out to the required size, that is, it is placed in a machine where the inside surface of the babbitt is cut down to the required size. (R. 54.) In the same setup, the surfaces on the two outer sides of the larger end of the rod are also machined so that they will comply with factory specifications. (R. 54.) Then a broaching operation follows the machining operation. (R. 54.) The connecting rod is placed in a horizontal position on the broach, which is a tool that is pressed down and through the bearing. As the broach goes down and through the large opening containing the newly poured babbitt metal its cutting surfaces cut the babbitt metal and make it measure according to specifications for the particular make of car for which it is to be used. (R. 54.)

Rods which do not have bushings at the smaller end are known as the clamping type. (R. 54.) When the rods are of the type which call for bushings, the old bushing is taken out and a new bushing is inserted to replace the old one which was formerly there. (R. 54-55.) The bushing end of the rod connects to the piston through a piston pin and the piston pin sets that bushing firmly against it. (R. 55.) The bearings and rods are also examined and checked for proper alignment. (R. 63.) Each rod is cleaned and finally

is immersed in an anti-rust solution so that it will not rust while on the shelf. (R. 55.)

As each article is finished it is put in a box which is placed on the shelf. (R. 59.) On each box there is specified the particular make of car for which it is to be used, together with appellee's trade name "MOR-O-LOY" and stock number therefor. (R. 59; Ex. 1.) The jobbers are appellee's immediate customers. (R. 59.) The boxes or cartons used by appellee some years ago had wording to the effect that the rods "are manufactured". Although that wording was used, appellee's witness Scotchler stated "it has not been used for some time now". (R. 57.)

According to the witness Scotchler, appellee's processes in the babbitting of forgings, as just described, are similar to those used by factories in the original processing of rods. (R. 56.)

None of the identifying symbols, trademarks, numbers or other identifying data appearing on the used connecting rod forgings acquired by appellee for its processes was marred or obliterated during the foregoing operations in appellee's shop. The same were left intact. (R. 18.)

Appellee's connecting rod processes involved grinding, polishing, grooving, broaching and machining operations, the assembling or combining of parts and materials, together with the employment of labor and skill, in order to produce connecting rods suitable for use thereafter as operating parts of automobile motors. (R. 18, 54.) The old connecting rods which

appellee dismantled for the purpose of salvaging the cap and shank therefrom for use in its processes were acquired by it with bearings and other parts in burned-out, worn and damaged condition due to former use in automobile engines. (R. 18, 39.)

STATEMENT OF POINTS TO BE URGED.

Appellant fully relies upon the statement of points set forth in the record (pp. 73-74). The main point is that the District Court erred in determining that the sales of connecting rods by appellee during the taxable period involved herein were not sales of automobile parts or accessories by a manufacturer or producer within the purview of Section 606(c) of the Revenue Act of 1932. Included as part and parcel of the reasons for the making of this error are the following more specific points:

(a) The Court erred in failing to find that the transactions involved sales by appellee of automobile parts or accessories, unless Findings Nos. 3 and 7, taken together, may be so construed in the light of the statements in the Court's opinion.

(b) The Court erred in finding (Fdg. 10) that all of the connecting rods involved were originally manufactured by persons, firms or corporations other than appellee, for the reason that the finding is clearly erroneous and unsupported by the evidence.

(c) The Court erred in finding (Fdg. 12) that the used connecting rods did not lose their identity

as connecting rods during the "rebabbitting" process in appellee's shop, for the reason that such finding, if material, is clearly erroneous and without support in the pleadings or evidence.

(d) The Court erred in finding (Fdg. 16) that the process performed by appellee did not constitute the manufacture or production of connecting rods but merely the repair, rehabilitation and reconditioning of used and second-hand rods, for the reason that the finding is clearly erroneous and without support in the evidence. Although purporting to be a finding of fact, it constitutes a conclusion of law, or at least a mixed question of fact and law.

(e) The Court erred in making the finding (Fdg. 17) that the "exchanges of rebabbitted connecting rods did not constitute sales of automobile parts or accessories by the manufacturer, producer or importer", for the reason that the same is clearly erroneous and constitutes a conclusion of law, or at least amounts to a mixed question of fact and law.

(f) The evidence does not support the findings and judgment.

SUMMARY OF ARGUMENT.

The transactions involved constituted sales of automobile parts within the meaning of the statute, which is a revenue measure exclusively and is to be construed accordingly. The automobile parts involved were fashioned by combining new materials with sal-

vaged materials and subjecting them to machine and hand operations which clearly constituted manufacturing and/or production processes. The completed articles were stocked, cartoned, labeled, numbered, cataloged and marketed by appellee under its own trade name "MOR-O-LOY" and were sold solely to jobbers for resale to garage men and mechanics for use in repairing automobile motors for individual car owners. From the standpoint of production and distribution in the trade, appellee performed the function of a manufacturer and producer of automobile connecting rods in the true sense and not the repairing of used or second-hand connecting rods for owners or users.

The better reasoned and recent decisions, including the decision of this Court in the *Armature Exchange* case,[1] support the view that appellee is a manufacturer or producer of automobile parts within the meaning of the taxing statute. Likewise, under the applicable Treasury Regulations which have been in effect for a long period of time, during which the statute has been re-enacted several times without material change, appellee is taxable as the producer or manufacturer of the articles it sold.

The judgment, ultimate findings and conclusions of the Court below are not supported by the evidence, are erroneous and should be reversed.

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1. *United States v. Armature Exchange*, 116 F. (2d) 969, certiorari denied, May 5, 1941.

ARGUMENT.

I.

THE TRANSACTIONS INVOLVED CONSTITUTED SALES OF AUTOMOBILE PARTS WITHIN THE MEANING OF THE STATUTE, WHICH IS A REVENUE MEASURE EXCLUSIVELY, AND IS TO BE CONSTRUED ACCORDINGLY.

By Section 606(c) of the Revenue Act of 1932 (Appendix, *infra*), an excise tax equivalent to 2% of the sales price is imposed with respect to automobile parts or accessories on the manufacturer, producer or importer thereof. No imports are involved here.

Clearly, the "MOR-O-LOY" connecting rods involved are automobile parts or accessories. No argument seriously can be advanced to the contrary. It is equally clear that the "MOR-O-LOY" rods were *sold* by appellee and were not the subject matter of contracts of repair for others. Thus, the alleged finding of the District Court (Fdg. 17, R. 19) that the transactions did not constitute sales of automobile parts by the manufacturer or producer is clearly erroneous. It is in reality a conclusion of law, or involves a mixed question of fact and law.[2] That this purported finding is erroneous is also evidenced by the memorandum opinion wherein the trial Court stated (R. 9) that the action is one to recover a payment of excise taxes "upon the sale of rebabbitted connecting rods from 1933 to 1936". The Court also stated (R. 9) that "When the rebabbitting of the connecting rods was finished" they "were delivered

2. In *Helvering v. Tex-Penn Co.*, 300 U.S. 481, it was held that the determination of a mixed question of law and fact is subject to judicial review. An Appellate Court may substitute its judgment for that of the trial Court.

to the * * * jobber who in turn sold them to the garage or automobile repair man". The Court also stated in the opinion (R. 11)

> That plaintiff is repairing its own rods *for sale* * * * is not significant. (Italics supplied.)

Likewise, in Finding 7 (R. 17) the Court stated that appellee did not include the taxes

> with the *price* of the articles with respect to which said taxes were imposed; and * * * did not collect the amount * * * from the *vendee* or *vendees* of the articles. (Italics supplied.)

Palpably, these references in the findings to *vendees* and *prices* are to sales transactions and necessarily presuppose their existence. So, also, a finding that the tax was not passed on to the *vendees* or included in the *price* of the articles sold is indispensable to recovery by reason of the express provisions of Section 621(d) of the Revenue Act of 1932. See *United States v. Jefferson Electric Co.,* 291 U.S. 386, involving a similar provision under an earlier Act.

Thus, viewed in the light of the explanatory statements in the Court's opinion and under the undisputed evidence, it hardly can be supposed that the Court found or intended to find as a fact that the transactions did not constitute sales of automobile parts or accessories. Nevertheless, if it should be so concluded, we submit that such a finding is clearly erroneous, and without support or foundation in the refund claim, pleadings, or evidence, and should be rejected. In any event, the conclusions contained in paragraph numbered 17 under the label of findings

(R. 19) must be viewed, as stated, in the light of the explanatory statements of the opinion. In this connection, appellee's chief witness, Scotchler, testified that when they *sell* these rods each one is *sold* in appellee's own boxes, properly marked and numbered. (R. 58-59, 61.)

From the foregoing, it is clear that the transactions involved constituted sales of automobile parts as distinguished from repair jobs upon articles belonging to others who retained the title thereto and who received the return thereof after the furnishing of materials and the performance of labor thereupon by appellee.

It is important to note that appellee did not predicate its claim or action upon the ground that the tax was computed upon an erroneous price basis. So far as can be gleaned from the record, the tax was paid on whatever basis was used by appellee in making and filing its monthly excise tax returns. No question was raised by appellee concerning the proper price basis, nor did appellee disclose, whether the outright price, consisting of part cash plus the value allowed for the old article taken in trade as part payment, or merely the cash portion of the sales price which appellee contends represented the cost of the alleged "repairing", was used in computing the tax in dispute.

Thus, the inquiry resolves itself solely into the question of whether appellee's sales of the "MOR-O-LOY" connecting rods for automobiles are taxable to it as the manufacturer or producer thereof within the meaning of the Act. The Court reached its deci-

sion against the Government by pyramiding one erroneous view upon another; first, it concluded that the loosely used characterization *"rebabbitting"* was truly descriptive of the processes of appellee; second, that such *"rebabbitting"* process by appellee constituted a process which was one of repair only and, third, having reached the latter conclusion, that it necessarily followed (irrespective of appellee's position in the trade from the standpoint of production and distribution) it could not be a manufacturer or producer.

We submit that the decision below is clearly erroneous. However, in fairness to the District Court, it should be observed that it did not have the benefit of this Court's opinion in *United States v. Armature Exchange,* 116 F. (2d) 969, certiorari denied, May 5, 1941, rendered months afterwards.

We make the same contention here as was made before this Court in the *Armature Exchange* case, *supra,* and in *Clawson & Bals v. Harrison,* 108 F. (2d) 991 (C.C.A. 7th), certiorari denied, 309 U.S. 685, involving sales of alleged "rebabbitted" connecting rods, namely, that appellee was engaged in the manufacture and/or production and sale of connecting rods and not in the business of repairing used, discarded and worn out connecting rods; that it had a factory, made connecting rods, and sold them—it did not enter into contracts for the performance of labor and supplying of material with respect to articles owned by others who retained ownership and sought merely to prolong the life thereof by having the articles repaired for their own use; that in connection

with the production of its article, appellee purchased used and worn-out connecting rods which had been discarded and relegated to the junk heap, i.e., it used in part scrap having a value essentially as raw material; that it stripped and dismantled the used and discarded connecting rods and salvaged and prepared the usable shanks and caps for its manufacturing and production processes; that by machine and hand operations, cleaning, cutting, grinding, polishing, manipulating, assembling, heating, chemically treating, adding and combining with the prepared salvaged parts new materials and industry, it processed and fashioned such articles into articles of merchandise which it stocked and marketed under its special trade name of "MOR-O-LOY"; that all of such articles were the equivalent of connecting rods processed, fashioned and fabricated entirely from materials which had not been previously utilized in similar manufactured articles. In other words, we contend that all of the essential elements of manufacture and/or production exist for the purpose of the taxing statute.

The statute is very broad and comprehensive and indicates a congressional intent to bring within its reach all persons placing automobile parts and accessories on the market for sale in the United States.

An example of the broad scope of the taxing provisions, as intended by Congress, is furnished by Section 623 of the Revenue Act of 1932, which provides:

> SEC. 623. SALES BY OTHERS THAN MANUFACTURER, PRODUCER, OR IMPORTER.

In case any person acquires from the manufacturer, producer, or importer of an article, by operation of *law or as a result of any transaction not taxable under this title,* the right to sell such article, the sale of such article by such person shall be taxable under this title as if made by the manufacturer, producer, or importer, and such person shall be liable for the tax. (Italics supplied.)

The applicable Treasury Regulations (Regulations 46) broadly define the terms used in the Act. They provide in part as follows:

ART. 4. *Who is a manufacturer or producer.*— As used in the Act, the term "producer" includes a person who produces a taxable article by processing, manipulating, or changing the form of an article, or produces a taxable article by combining or assembling two or more articles.

Under certain circumstances, as where a person manufactures or produces a taxable article for a person who furnishes materials and retains title thereo, the person for whom the taxable article is manufactured or produced, and not the person who actually manufactures or produces it, will be considered the manufacturer.

* * * * * * *

ART. 41. *Definition of parts or accessories.*— The term "parts or accessories" for an automobile truck or other automobile chassis or body, or motorcycle, includes (a) any article the primary use of which is to improve, repair, replace, or serve as a component part of such vehicle or article * * *.

Section 1111(b) of the Revenue Act of 1932 provides that the term "includes" when used in a definition in the Act shall not be deemed to exclude other things otherwise within the meaning of the term defined, and Article 2 of Treasury Regulations 46 provides that the "terms used in these regulations have the meaning assigned to them by section 1111".

Thus, it was obvious that Congress intended to impose the tax upon the sale of each and every automobile part or accessory produced and sold to wholesalers, jobbers and distributors, as well as sales by the producer or manufacturer directly to the retailer or ultimate consumer. However, the decision below, if allowed to stand, would nullify such congressional intent by permitting the production of automobile parts from a combination of new materials with salvaged parts of worn-out articles having no other value than that of junk, and the sale thereof in competition with similar automobile parts produced entirely from new materials, without being subjected to tax upon sale to the wholesale trade.

Our contention is consistent with the definition of a manufacturer or producer as used in the Treasury Regulations which have been in effect for a long period of years, during which time the statute has several times been re-enacted without change, so far as here material. Article 4, *supra,* of Treasury Regulations 46, provides that a producer includes a person who "produces a taxable article by combining or assembling two or more articles". Although this definition seemed amply clear, it has been made even

clearer by Section 316.4 of the 1940 Edition of Treasury Regulations 46 which were promulgated under Section 3450 of the Internal Revenue Code with respect to excise tax provisions covering automobile parts, tires, tubes, and other taxable articles. (See Section 3400, *et seq.,* Internal Revenue Code.) Section 316.4, *supra,* provides:

> *Who is a manufacturer.*—The term "manufacturer" includes a person who produces a taxable article from scrap, salvage, or junk material, as well as from new or raw material, (1) by processing, manipulating, or changing the form of an article, or (2) by combining or assembling two or more articles.

The decision of this Court in the *Armature Exchange* case, *supra,* is squarely in point and accords with the views and reasoning hereinabove expressed.

It should be remembered that the excise tax is a revenue measure exclusively. Thus, the facts must be considered in the light of such statutory object and purpose.

The tax is on each transaction at the rate of 2% of the manufacturer's or producer's sale price of the article sold. It is not imposed upon repair jobs involving mere contracts for labor and material with respect to articles owned and used by another. Yet the Court below expressed the view that (R. 11) there is no difference between the case of a shoe cobbler repairing shoes of others and appellee "repairing its own rods for sale". An effective answer to this statement was furnished, we believe, by the Seventh Cir-

cuit Court of Appeals in *Clawson & Bals v. Harrison,* 108 F. (2d) 991, 994, wherein it said:

> The fact that the taxpayer could perform for the owner of used connecting rods all of the mechanical operations which it does perform under the facts of this case, and still properly be classified as a repairer, does not require a holding that the taxpayer is a repairer when it purchases discarded rods to be used as materials for combination with other materials of the taxpayer, and by means of mechanical operations prepares what are, for all practical purposes, new connecting rods for sale in the trade.

Because of the hundreds of thousands of transactions occurring daily throughout the county, which are subject to the excise tax provisions, the method of ascertainment of such taxes must be possible of accomplishment without being fettered by technical refinements which tend to defeat the purpose of the statute as a means of raising revenue. The following quotation from *Raybestos-Manhattan Co. v. United States,* 296 U.S. 60, 63, is apropos here:

> The reach of a taxing act whose purpose is as obvious as the present is not to be restricted by technical refinements.

See, also, *Founders General Co. v. Hoey,* 300 U.S. 268, to the same effect.

In *Tyler v. United States,* 281 U.S. 497, the Court stated (p. 503):

> The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions * * *.

> Taxation, as it many times has been said, is eminently practical * * *.

In the *Tyler* case the Court held that the congressional intent to tax decedent's interest at date of death in a tenancy by the entireties could not be restricted by the technical incidents of such common law tenancy. Likewise, the terms "manufacturer" or "producer", used in the statute, should not be treated as words of art, but rather construed so as to effectuate the evident broad intent of Congress with respect to the taxation of automobile parts. In *Turner v. Quincy Market Cold Storage & Warehouse Co.,* 225 Fed. 41, 43 (C.C.A. 1st), it was held that the term manufacture "is a very broad word, which it is not safe to limit in a general way". See *Hughes & Co. v. City of Lexington,* 211 Ky. 596, 277 S.W. 981, 982, wherein the Court, in holding that appellant was engaged in manufacturing, stated:

> That the definition of the term is a question of law and for the courts is plain, but the courts are practically agreed that it is incapable of exact definition, and that there is no hard and fast rule which can be applied, but that *each case must turn upon its own facts, having regard for the sense in which the term is used and the purpose to be accomplished.* [Citing cases.] (Italics supplied.)

In *Carbon Steel Co. v. Lewellyn,* 251 U.S. 501, it was held that the rule of strict construction will not be pressed so far as to reduce the taxing statute to a practical nullity by permitting easy evasion. The Court stated (p. 505):

> It is, of course, the contention of petitioner that this was furnishing, not *manufacturing,* and that the literal meaning of words can be insisted on in resistance to a taxing statute. We recognize the rule of construction but it cannot be carried to reduce the statute to empty declarations. And, as we have already said, petitioner's contention would so reduce it.

It may be added that the proper guide for the interpretation and construction of Section 606(c)—as for all internal revenue laws—was furnished by the Supreme Court in *Stone v. White,* 301 U.S. 532, 537:

> It is in the public interest that no one should be permitted to avoid his just share of the tax burden except by positive command of law, which is lacking here.

It follows from what has been said that the first question for determination in a case of this kind is whether there has been a *sale* of the articles under consideration, for if there has been no sale the statute does not apply. If the articles have been sold, the only remaining inquiry is whether the seller was also the manufacturer, producer, or importer thereof, within the meaning of the applicable statute and regulations. In passing upon the latter question, it should be borne in mind that the idea of one repairing an article for another is opposed to the idea that the repairer may be simultaneously the seller of the article itself upon completion of his contract for the performance of labor and supplying of materials. Yet, conversely, the appellee contends in substance that although it was the seller of the articles in ques-

tion, it should be held to be only the repairer thereof. There is no question but that the "MOR-O-LOY" connecting rods were sold by appellee for use by ultimate vendees in repairing automobile engines.

II.

APPELLEE IS THE MANUFACTURER OR PRODUCER OF THE MOROLOY CONNECTING RODS SOLD BY IT AND NOT MERELY A REPAIRER OF SECONDHAND, DAMAGED AND WORN-OUT CONNECTING RODS.

Appellee is engaged in the business of selling automobile parts to automotive jobbers in the area between Fresno and the Oregon line. The jobbers, known also as wholesalers, are appellee's immediate customers. (R. 59.) They are located in all important towns. Appellee operated a plant or factory, had machinery and equipment for its operations, produced more than 50,000 connecting rods each year, maintained a stock for sale of at least 250 different types of connecting rods, and cartoned or boxed each in a container marked with appellee's own trade name and stock number.

The taxing statute does not discriminate between automobile parts produced entirely from new materials and those produced by combining new materials with usable materials salvaged from discarded articles, scrap or junk purchased and dismantled for such purpose. Neither do the definitions of the words manufacturer, producer, manufacture, or produce, require that a manufactured article shall consist entirely of new or virgin raw materials. In fact, it has

been held that a manufactured article need not be made wholly or even in part of raw material. *The King v. Biltrite Tire Co.,* 1937 Canada Law Rep. (Ex. C.R.) 1, 14.

Appellee obviously considered itself the producer of the connecting rods it stocked and sold, otherwise it is not likely that it would have adopted the trade name under which it advertised and catalogued its product. The rods were placed by appellee in marketable or merchantable form with the usual standard guarantee for such articles. It agreed to replace the "assembly if defective in material or workmanship", and such guarantee was printed on each box containing a Moroloy connecting rod. (Ex. 1, R. 61.)

Appellee's chief witness testified (R. 42) that the Federal Mogul Corporation, an eastern corporation, is one of appellee's competitors. In this connection, it should be observed that the United States District Court for the Southern District of Indiana, in a case involving the connecting rods produced by the Federal Mogul Corporation by processes similar to those shown here, held that it was a producer or manufacturer of the connecting rods within the meaning of the statute here under consideration. The findings in the *Federal Mogul* case are very enlightening. They are not officially reported but may be found in Volume 4 of the 1940 Prentice-Hall Tax Service, par. 62,510 (*Federal Mogul Corp. v. Smith,* decided February 22, 1940). They contain the definition of a connecting rod and mention the plant of the Federal Mogul Corporation located at San Francisco which obviously

is the plant referred to by appellee's witness Scotchler. (R. 42.) The processes followed in the so-called "re-babbitting" of connecting rods are set forth in greater detail in the Federal Mogul Corporation findings than are disclosed by the evidence in the instant case. It appears that about 80% of the rods sold by the Federal Mogul Corporation had bronze bushings in the wrist pin end of the rod and that bronze bushings are bearings and are just as important and necessary as the babbitt bearing at the larger end; also, that one bearing cannot work successfully without the other. In the instant case, the evidence discloses that some of the connecting rods were of the clamp type and others were of the bronze bushing type, but it does not show what percentage each type comprised of appellee's total production. Ford rods require bronze bushings. Oil release holes must be drilled through the bushings for oiling purposes before assembling. The new bushings must be completely severed and grooved on the inside.

In view of the information contained in the *Federal Mogul* and *Clawson & Bals* findings and decisions, both of which cases involved utilization of the cap and shank of used connecting rods in the production of rods for sale to the trade, this Court will take notice of the fact that the trade characterization "re-babbitted" does not furnish an accurate or complete description of the processes undertaken by persons who sell articles of the disputed type to wholesale automotive jobbers. Consequently, and in view also of the evidence in this case, we submit that the Court

below erroneously found (Fdg. 10, R. 18) that the connecting rods (which were sold by appellee) were originally manufactured by others. In view of the processes disclosed by the evidence, it is not possible to correctly so find. The Court might have found that the caps and shanks used in appellee's processes originally had been made by others but such a finding would not detract from our contention herein.

Likewise, the Court erred in finding that the used connecting rods did not lose their identity as connecting rods during, or as a result of, the "rebabbitting process in plaintiff's shop". As disclosed by the evidence here, and the findings in the *Federal Mogul* and *Clawson & Bals* cases, *supra,* the babbitting process is not the chief operation in the production of connecting rods. This is particularly true where the rods are equipped with bronze bushings. In such cases the bronze bearing and babbitt bearing, as stated, are equally important and, in addition, there is the requirement of shims and new nuts and bolts so that the only used materials involved in such a rod may be comprised of a formerly used cap and shank.

Although the evidence does not show exactly what was done in the instant case, it appears from the *Federal Mogul* findings that it is not necessary in all cases that the used cap be put back on the same shank. This is especially true in the case of Ford rods. Thus, it frequently may occur that upon completion of a rod it may contain a cap from one formerly used rod, a shank from another used rod, and the balance thereof entirely new materials.

We believe the foregoing discussion aptly demonstrates that appellee did not sell what were in fact "rebabbitted" connecting rods but sold to the trade connecting rods which it fashioned and produced from commingled scrap and new materials.

The only ground upon which appellee relied for recovery in bringing its action is stated in Paragraph V of the complaint as follows (R. 3):

> That none of the articles upon which the assessment hereon was levied or the tax herein paid, were manufactured, or produced, or imported by the plaintiff herein. That plaintiff did not act as dealer or vendor of the said articles, but did repairing of the said articles by inserting babbitt alloy in the said articles.

Clearly, appellee failed to prove that it was not the vendor of the articles upon which the tax was paid. On the contrary the evidence establishes that it was the vendor. It also failed to prove that it merely inserted babbitt alloy in the articles. Appellee's own evidence refutes the foregoing ground of the complaint to which appellee is limited in seeking a refund herein. The evidence discloses the use of new bushings, new shims, new nuts and bolts and new tin in its assembling, combining, machining and other operations. Consequently, the Moroloy rods which were sold by appellee were not rods originally manufactured by others than appellee, or rods which previously had been used as operating parts of automobiles, as found by the Court. As stated above, those findings are clearly erroneous.

The evidence definitely established that appellee was the producer of the connecting rods it sold because the essential elements of manufacture or production were shown to exist. It acquired worn-out connecting rods from which it salvaged the usable parts and then by machine and hand operations, together with the addition of new materials, it assembled and fashioned an automobile part which it marketed under its own trade name in competition with similar products manufactured by others, including the Federal Mogul Corporation. It made a serviceable and salable product from scrap and raw materials. Whether appellee itself manufactured the shank and cap used in producing Moroloy connecting rods would appear to be immaterial. The essential fact is that appellee combined the salvaged individually useless items with new materials and, through the employment of skill, labor and machinery, produced a valuable item of commerce which it sold to the trade. Thus, from the standpoint of production and distribution in the trade appellee performed the function of a producer or manufacturer rather than a repairer.

III.

THE APPLICABLE DECISIONS SUPPORT THE CONTENTION THAT APPELLEE IS A MANUFACTURER OR PRODUCER OF AUTOMOBILE PARTS WITHIN THE PURVIEW OF THE TAXING STATUTE.

The Government's position that persons engaged in selling automobile parts processed by them from a combination of usable parts (salvaged and prepared

from dismantled formerly used parts) and new materials are producers and/or manufacturers of automobile parts and accessories within the meaning of the taxing statute is supported by the following decisions:

United States v. Armature Exchange, decided by this Court, involving automobile generator armatures processed from a combination of new and used materials. The taxpayer sold its armatures in boxes bearing the legend "Armex Rebuilt Armatures". 116 F. (2d) 969, 970, certiorari denied, May 5, 1941.

Clawson & Bals v. Harrison, 108 F. (2d) 991 (C.C.A. 7th), certiorari denied, 309 U.S. 685, involving alleged "rebabbitted" connecting rods made by taxpayer from a combination of used caps, shanks, nuts and bolts and new materials.

Edelman & Co. v. Harrison (N.D. Ill.), decided April 7, 1939, not officially reported but published in 1939 Prentice-Hall, Vol. 1, par. 5.379, involving so-called "rewound" armatures and "rebuilt" generators for automobiles made by taxpayer from a combination of new and used materials.

Federal-Mogul Corp. v. Smith (S.D. Ind.), decided February 23, 1940, not officially reported but published in 1940 Prentice-Hall, Vol. 4, par. 62,510, involving automobile connecting rods made by taxpayer from a combination of new and used materials in a manner similar to that involved in the *Clawson & Bals* case, *supra,* and the instant case.

Moore Bros., Inc. v. United States (N.D. Tex.), decided May 14, 1940, not officially reported but pub-

lished in 1940 Prentice-Hall, Vol. 4, par. 62,676, involving so-called "rebuilt" automobile armatures.

The case of *Motor Mart v. United States* (N.D. Tex.), (involving generators and armatures) was decided for the Government on May 14, 1940, without opinion (Civil Action #239).

Biltrite Tire Co. v. The King, 1937 Canada Law Rep. 364, arising under the Canadian War Revenue Act of 1927, involving language similar to that used in Section 606(c) of the United States Revenue Act of 1932, and involving so-called "retreaded" automobile tires.

The King v. Boultbee, Ltd. [1938], 3 Dominion Law Rep. 664, involving so-called "retreaded" automobile tires made by taxpayer on a small scale. Taxpayer also did considerable retreading of tires for customers to whom the tires were returned. The latter transactions were not sought to be taxed because they did not involve a sale of the completed article but merely a contract for the furnishing of materials and labor.

In *Foss-Hughes Co. v. Lederer* (E.D. Pa.), 287 Fed. 150, an assembler of truck parts was held to be taxable as a producer of trucks within the meaning of the excise tax law of October 3, 1917. The law provided for a tax on automobile trucks sold by the manufacturer, producer, or importer. The taxpayer was a dealer who neither imported nor manufactured but purchased the chassis from the manufacturer and then employed a contractor to add the body. He was held liable as a producer of trucks in these circum-

stances. In this case, the Court apparently recognized that the term "producer" is broader than the term "manufacturer".

In *Klepper v. Carter,* 286 Fed. 370, 371, this Court cited and relied upon the *Foss-Hughes* case, *supra.* In the *Klepper* case this Court held a retail salesman liable under the 1919 version of the 1932 excise tax law as a manufacturer or producer of automobile trucks. The salesman merely purchased automobile truck bodies from one manufacturer and chasses from another, and assembled the two parts. The Court directed attention to the fact that Article 7 of the December, 1920, revision of the Regulations defined the word "manufacturer" as generally a person who (1) actually makes a taxable article; or (2) by changes in the form of an article produces a taxable article; or (3) *by the combination of two or more articles produces a taxable article.* This Court said that the retail salesman, Klepper, saved the purchaser all the trouble of assembling the chassis and body, and made it his business to retail the product of his purchases as an automobile truck; that he thus produced or manufactured the truck.

In *Cadwalader v. Jessup & Moore Paper Co.,* 149 U.S. 350, the recovery of customs duties was sought on the ground that old india-rubber shoes imported by Jessup and Moore were valuable only as a substitute for crude rubber and, therefore, were exempt from duty under the free classification "India-rubber, crude and milk of". A duty of twenty-five per cent *ad valorem* had been collected on the old shoes as (p.

351) "articles composed of india-rubber, not specially enumerated or provided for in this act". Another section of the act provided for a duty on non-enumerated articles equal to that imposed upon the enumerated articles they most nearly resembled, and where they resembled two or more enumerated articles, that taking the highest duty was to be used as the basis. The Supreme Court, in holding the articles to be non-dutiable, held that the old shoes had lost their commercial value as such articles, and substantially were merely the material called "crude rubber". Thus, the principle of the *Cadwalader* case supports the contention that a taxpayer engaged in the production of automobile parts in the manner herein disclosed is a manufacturer and producer since, because of the loss of their commercial value, the used connecting rods are essentially raw material.

Although we contend that the patent infringement decisions and some of the tariff cases are not in point, the two following cases are of interest:

In *Cotton Tie Co. v. Simmons,* 106 U.S. 89, the Court held that one who bought used cotton-bale ties, consisting of a metal buckle and a band, which were patented, and who rolled and straightened the pieces of the bales, riveted the ends together, and cut them into proper lengths and sold them with the buckles to be used again as ties, had "reconstructed" and not merely "repaired" the bale-ties in the patent law sense and was guilty of infringement even though no new material parts were added.

In *Davis Electrical Works v. Edison Elec. Light Co.,* 60 Fed. 276 (C.C.A. 1st), the Court held that the making of a hole in the bulb of an Edison incandescent lamp, in which the filament has been destroyed by use, and the putting in of a new filament and closing of the hole by fusing a piece of glass over it and then exhausting the air, constituted "reconstruction" and not merely repairing as matter of patent law.

There can be no dispute but that when appellee acquired the used and worn-out automobile parts, they were classifiable as scrap and junk. The following definitions and authorities concerning scrap and junk seem clearly applicable:

56 *Corpus Juris* 884-885, states:

> *Scrap.* (Sec. 1) A. *As Noun.* The word originally meant what was scraped off. It has come to have an extended meaning and includes anything that is thrown aside. The word has reference to the antecedent history of the article and not to the use that a new owner might make of it.
>
> * * * * * * *
>
> (Sec. 2) B. *As Adjective.* On the form of scraps; also valuable only as raw material.

In *Ward, Ltd. v. Midland R. Co.,* 33 T. L. R. 4, 6 (Eng.), "scrap" was defined as follows:

> An article was scrap if it was no longer useful to its owner; the word had reference to the antecedent history of the article and not to the use that a new owner might make of it.

The word "junk" has been held to include discarded parts of machinery. *City of Duluth v. Bloom,* 55 Minn. 97, 100, 21 L.R.A. 689, 690. Discarded automobile fixtures were held to be within the definition of "junk" in *Melnick v. City of Atlanta,* 147 Ga. 525, 94 S.E. 1015. In *City of Chicago v. Reinschreiber,* 121 Ill. App. 114, 120, the Court defined the word "junk" as (pp. 118-119),

> worn out or discarded material in general, that still may be turned to some use, especially old rope, chain, iron, copper, parts of machinery, bottles, etc., gathered or bought up by persons called "junk dealers" * * *.

In the instant case, the used parts were nothing more than "junk" when received by appellee. The principal purpose of its business was to produce and sell automobile connecting rods for numerous makes of automobiles from a combination of new or prepared raw materials and essentially raw material which appellee prepared. The acquisition of second-hand material was merely incidental to its production and/or manufacturing business.

In *City of Louisville v. Zinmeister & Sons,* 188 Ky. 570, 222 S.W. 958, the Court stated (pp. 575-576):

> Courts have experienced much difficulty in determining what is a manufacturing establishment and what is included in the term "manufacture." There is no hard and fast rule by which to determine whether a given establishment is a "manufactory," but *all the facts and circumstances must be taken into consideration* in determining

whether the establishment is or is not to be so reckoned. *Whether it is such an establishment does not depend upon the size of the plant, the number of men employed, the nature of the business or the article to be manufactured, but upon all these together and upon the result accomplished.*

If raw material is converted at a factory or plant into a finished product, complete and ready for the final use for which it is intended, or so completed as that in the ordinary course of business of the concern it is ready to be put upon the open market for sale to any person wishing to buy it, the plant which turns it out is a manufacturing establishment within the meaning of the statute * * *. (Italics supplied.)

Likewise, in the instant case it is important to consider all the surrounding facts and circumstances and not limit consideration of the question involved to any single factor, or to the narrow confines of an antiquated literal interpretation of the word "manufacture" as understood prior to the advent of modern machinery and industrial methods of salvaging for manufacturing purposes.

If the terms "manufacturer" and "producer" are to be whittled away by fine distinctions, the intent and purpose of Congress to impose a tax upon automobile parts produced and sold to jobbers and wholesalers will necessarily be defeated. *In re First Nat. Bank,* 152 Fed. 64, 67 (C.C.A. 8th).

If appellee had imported used connecting rods and done nothing whatsoever to them and then had sold

them, it would have incurred an excise tax under the statute in question as an "importer".

In addition to the foregoing decisions, it may be noted that the taxpayers in the following cases voluntarily dismissed their refund actions after the action of the Seventh Circuit Court of Appeals in the *Clawson & Bals* case, *supra:*

S. & R. Grinding & Machine Co. v. United States (W.D. Pa.) (involving connecting rods), voluntarily dismissed on plaintiff's motion, despite the fact it earlier had obtained a favorable ruling on the Government's motion to dismiss. The ruling on the motion to dismiss is reported in 27 F. Supp. 429.

Federal-Mogul Corp. v. Kavanagh (E.D. Mich.) (involving connecting rods) voluntarily dismissed by taxpayer as the parties were about to proceed to trial.

The following decisions, all of which are of District Courts, are against the Government. However, most of them have been, in effect, overruled by the later decisions of the Seventh Circuit Court of Appeals and of this Court, as hereinafter indicated:

Monteith Brothers Co. v. United States (N.D. Ind.), decided October, 1936, not officially reported but published in 1936 Prentice-Hall, Vol. 1, par. 1710 (involving armatures and connecting rods), overruled by the Seventh Circuit Court of Appeals in the *Clawson & Bals* case, *supra.*

Hempy-Cooper Mfg. Co. v. United States (W.D. Mo.), decided May 6, 1937, not officially reported but published in 1937 Prentice-Hall, Vol. 1, par. 1461 (involving connecting rods).

Bardet v. United States (N.D. Cal.), decided May 18, 1938, not officially reported but published in 1938 Prentice-Hall, Vol. 1, par. 5507 (involving connecting rods). This case was overruled by the decision of this Court in the *Armature Exchange* case, *supra.*

Becker-Florence Co. v. United States (W.D. Mo.), decided December 27, 1938, not officially reported but published in 1939 Prentice-Hall, Vol. 1, par. 5161 (involving armatures).

Con-Rod Exchange, Inc. v. Henricksen, 28 F. Supp. 924 (W.D. Wash.) (involving connecting rods). This case was overruled by the decision of this Court in the *Armature Exchange* case, *supra.*

J. Leslie Morris Co. v. United States (S.D. Cal.), decided July 24, 1940, not officially reported but published in 1940 Prentice-Hall, Vol. 4, par. 62,803 (involving connecting rods), was overruled by the decision of this Court in the *Armature Exchange* case, *supra.* The *Morris* case is now pending before this Court on the Government's appeal.

Armature Rewinding Co. v. United States (E.D. Mo.), decided September 30, 1940, not officially reported but published in 1940 Prentice-Hall, Vol. 4, par. 62,887 (involving generators and armatures). This case is now pending on the Government's appeal before the Eighth Circuit Court of Appeals.

Such of the foregoing cases as were not appealed did not present satisfactory records. However, we contend that the adverse decisions were erroneous.

IV.

THE GOVERNMENT'S POSITION IS ALSO SUPPORTED BY THE TREASURY REGULATIONS WHICH IN THE LIGHT OF THE HISTORY AND REENACTMENT OF THE TAXING PROVISIONS WITHOUT MATERIAL CHANGE HAVE BEEN GIVEN CONGRESSIONAL APPROVAL.

The Government's position is consistent with Treasury Regulations 46, 1932 Edition:

> ART. 4. *Who is a manufacturer or producer.*—As used in the Act, the term "producer" includes a person who produces a taxable article by processing, manipulating, or changing the form of an article, or produces a taxable article *by combining or assembling two or more articles.* (Italics supplied.)

Section 316.4 of Treasury Regulations 46, 1940 Edition, is to the same effect as Article 4, *supra,* except that the later Regulations are even more specific, namely:

> SEC. 316.4. *Who is a manufacturer.*—The term "manufacturer" includes a person who produces a taxable article from scrap, salvage, or junk material, as well as from new or raw material (1) by processing, manipulating, or changing the form of an article, or (2) *by combining or assembling two or more articles.* (Italics supplied.)

Article 7 of the applicable Treasury Regulations, as revised in December, 1920, defines a manufacturer as generally a person who

> (1) actually makes a taxable article; or (2) by changes in the form of an article produces a taxable article; or (3) *by the combination of two or more articles produces a taxable article.* (Italics supplied.)

The italicized part of the 1920 revision of the Regulations was carried forward in Regulations 47, revised March, 1926, as Article 6 thereof, also in the 1921 and 1924 Regulations under the 1921 and 1924 Revenue Acts.

The same definition of manufacturer was also carried forward in Regulations 46, under the Revenue Act of 1932, as Article 4 thereof as shown above.

The following is a history of the enactment and reenactment of the excise tax law with respect to automobile parts and accessories:

The Revenue Act of 1918, c. 18, 40 Stat. 1057, Section 900(3), was the first to impose a tax on automobile parts and accessories as distinguished from automobiles themselves which were first taxed under the 1917 Act. The rate, under the 1918 Act, on such parts and accessories was 5%. The tax was re-enacted by Section 900(3) of the Revenue Act of 1921, c. 136, 42 Stat. 227, and the rate was the same, effective as of January 1, 1922.

Under Section 600(3) of the Revenue Act of 1924, c. 234, 43 Stat. 253, the tax was carried forward and the rate was reduced to 2½%.

The Revenue Act of 1926, c. 27, 44 Stat. 9, Section 600, taxed "automobile chasses and bodies and motorcycles (including tires, inner tubes, parts and accessories therefor, sold on or in connection therewith or with the sale thereof)" at 3%. Therefore, under the 1926 Act, parts and accessories sold separately were not taxed.

The Revenue Act of 1928, c. 852, 45 Stat. 791, Section 421, repealed, as of the date of its enactment, May 29, 1928, the taxes on automobiles.

By Section 606 of the Revenue Act of 1932, the tax again was placed on automobiles, parts and accessories, among other things.

The 1932 Act remained in effect during the passage of all subsequent Revenue Acts and was re-enacted in the subsequent Acts or extended by resolution, and was re-enacted in the Internal Revenue Code as Section 3403.

Section 3403 was amended by Section 1 of the Revenue Act of 1939, c. 247, 53 Stat. 862, and Sections 209 and 216 of the Revenue Act of 1940, Public No. 656, 76th Cong., 3d Sess., but was not changed so far as here material.

Section 210 of the 1940 Act amends the Internal Revenue Code by adding a new section thereto, the effect of which is to change the rate on automobile parts and accessories from 2% to 2½% for the period after June 30, 1940 and before July 1, 1945.

If in addition to Article 4 of Treasury Regulations 46, approved June 18, 1932, providing that as used in the Act the term "producer" includes a person who produces a taxable article by combining or assembling two or more articles, more were needed, attention is directed to the fact that this provision has appeared in the Treasury Regulations since 1920, during which time the taxing statute has been re-enacted several times without material change. Under the established

rule Congress must be taken to have approved the administrative construction and thereby to have given it the force of law. *Helvering v. Reynolds Tobacco Co.,* 306 U.S. 110, 115; *United States v. Armature Exchange, supra.*

See, also, S.T. 896, 1940-2 Cum. Bull. 252, published February 19, 1940, to the effect that persons who manufacture or produce connecting rods from used or worn-out connecting rods and new material are manufacturers and producers within the meaning of Section 606 of the Revenue Act of 1932, and are subject to tax thereunder upon the sales of such rods.

By S.T. 896, the following earlier rulings were modified to accord with the principles laid down in the *Clawson & Bals* decision:

S.T. 606, XI-2 Cum. Bull. 476 (1932), relating to rebuilt taxi meters.

S.T. 648, XII-1 Cum. Bull. 384 (1933), and S.T. 812, XIV-1 Cum. Bull. 406 (1935), relating to retreaded and rebuilt tires.

Thus, under any view of the case, the evidence brings appellee squarely within the definition of a manufacturer or producer as set forth in the Regulations for the past twenty years, namely, that "a person who * * * produces a taxable article by combining or assembling two or more articles" is included in the term "producer" as used in the Act.

In conclusion, it is submitted that under the applicable statute, decisions, Regulations, and undisputed evidence the Court below should have made ultimate

findings of fact in favor of appellant and granted judgment dismissing appellee's complaint.

CONCLUSION.

It is submitted that the law and undisputed evidence do not support the ultimate findings, conclusions, and judgment below. The judgment should be reversed.

Dated, San Francisco,
July 18, 1941.

Respectfully submitted,

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(Appendix Follows.)

Appendix.

Appendix

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 606. TAX ON AUTOMOBILES, ETC.

There is hereby imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:

* * * * * * *

(c) Parts or accessories (other than tires and inner tubes) for any of the articles enumerated in subsection (a) or (b), 2 per centum. * * *

[Note: Subsections (a) and (b) refer to automobiles, automobile trucks and motorcycles.]

Treasury Regulations 46, approved June 18, 1932:

ART. 4. *Who is a manufacturer or producer.*—As used in the Act, the term "producer" includes a person who produces a taxable article by processing, manipulating, or changing the form of an article, or produces a taxable article by combining or assembling two or more articles.

Under certain circumstances, as where a person manufactures or produces a taxable article for a person who furnishes materials and retains title thereto, the person for whom the taxable article is manufactured or produced, and not the person who actually manufactures or produces it, will be considered the manufacturer.

A manufacturer who sells a taxable article in a knockdown condition, but complete as to all com-

ponent parts, shall be liable for the tax under Title IV and not the person who buys and assembles a taxable article from such component parts.

ART. 41. *Definition of parts or accessories.*—The term "parts or accessories" for an automobile truck or other automobile chassis or body, or motorcycle, includes (a) any article the primary use of which is to improve, repair, replace, or serve as a component part of such vehicle or article, (b) any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, or (c) any article the primary use of which is in connection with such vehicle or article whether or not essential to its operation or use.

The term "parts and accessories" shall be understood to embrace all such parts and accessories as have reached such a stage of manufacture that they constitute articles commonly or commercially known as parts and accessories regardless of the fact that fitting operations may be required in connection with installation. The term shall not be understood to embrace raw materials used in the manufacture of such articles.

Spark plugs, storage batteries, leaf springs, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts of, automobile truck or other automobile chassis or motorcycles, are considered parts or accessories for such articles whether or not primarily designed or adopted for such use.